

EXHIBIT 2

From: [David R. Cohen \(David@SpecialMaster.Law\)](mailto:David@SpecialMaster.Law)
To: [Flahive Wu, Laura](#); [Andrea Bierstein](#); [2804 Discovery, MDL](#); [MDL 2804](#); ["xALLDEFENDANTS-MDL2804-Service@arnoldporter.com"](#)
Subject: Re: EXTERNAL-RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines
Date: Thursday, October 10, 2019 10:17:05 PM

External E-mail

The errata are stricken.

Plaintiffs may not pursue future damages at trial.

These rulings will be formalized by me on Monday. Objections will be due on Tuesday at the FPT.

I will also enter rulings on Monday regarding undeposed witnesses (e.g. pharmacists, and Bornstein/Howard/Johnson) if a deal has not been struck.

We will meet on Monday at 1:00p in the Courthouse with a court reporter present so that these and other rulings can be recorded and to address other trial matters.

-David

=====
This email sent from:
David R. Cohen Co. LPA
24400 Chagrin Blvd., Suite 300
Cleveland, OH 44122
216-831-0001 tel
866-357-3535 fax
www.SpecialMaster.law

From: Flahive Wu, Laura <lflahivewu@cov.com>
Sent: Thursday, October 10, 2019 8:06 PM
To: Andrea Bierstein <abierstein@simmonsfirm.com>; 2804 Discovery, MDL <mdl2804discovery@motleyrice.com>; MDL 2804 <MDL2804@motleyrice.com>; David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>; 'xALLDEFENDANTS-MDL2804-Service@arnoldporter.com' <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>
Subject: RE: EXTERNAL-RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

Special Master Cohen,

Please see the attached letter, respectfully requesting a ruling as soon as you can provide one. For your convenience, the text of the letter is included below.

Regards,

Laura

* * *

Dear Special Master Cohen:

I write in follow-up to David Haller's letters of September 23 and October 2, as well as my separate letter of October 2. As discussed in these letters, Plaintiffs are attempting to circumvent your August 13 Order barring supplemental opinions from experts Cutler and McGuire by proffering those same opinions under the guise of misnamed "Errata." Those new opinions purport to create upwards of \$300 million in new damages claims against Distributor Defendants, on the eve of trial, based on calculations you determined were untimely and prejudicial when first disclosed in late July. As discussed in my October 2 letter, Plaintiffs then purported to build upon that circumvention by serving a series of "Future Damages" calculations "Based on Errata," containing another \$800 million in new damages theories predicated upon the untimely Cutler and McGuire supplements/errata. Taken together, these actions threaten to add well over \$1 billion to the claimed legal damages mere weeks before the start of trial, with Distributor Defendants having no opportunity to conduct discovery of those opinions.

Plaintiffs' only response to my further request for an order striking these untimely expert disclosures was an email asserting that the timeliness of their "Future Damages" opinions (though not the Errata) was not properly before you because the permissibility of a claim for future damages is also the subject of a motion in limine. However, that motion in limine was filed *before* service of these untimely expert disclosures, and it concerns the question whether Plaintiffs may seek future damages at all. The separate question that is properly before you is whether Plaintiffs may introduce at trial new expert opinions that were (i) first disclosed less than a month before that trial, and (ii) were disclosed only as final calculations unsupported by a "complete statement . . . of the basis and reasons for them." *See Vance v. United States*, 182 F.3d 920, 1999 WL 455435, at*5-*6 (6th Cir. 1999) (Table) (expert supplement served shortly before trial was properly excluded as its timing ensured the "opposing party would have virtually no opportunity to depose the expert"); *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 270-71 (6th Cir. 2010) (finding the "[m]ost troubling" deficiency in expert's disclosure, for which exclusion was required, was that the expert "failed to discuss the basis of his conclusion" as required by Rule 26); *Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.2d 655, 664 (6th Cir. 2005) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." (quotation and alteration omitted)).

We respectfully seek a ruling as soon as you can provide one. While the late timing of these disclosures ensures that Distributor Defendants could not possibly receive due process if the opinions are permitted, we are at this moment in a position of uncertainty over whether scarce trial resources must be devoted towards preparing examinations relating to these opinions. Further, if these new opinions are permitted,

significant additional discovery will be necessary including document and deposition fact discovery, and depositions of several of Plaintiffs' experts, as well as time for Defendants' experts to perform responsive analyses and opinions. With the pre-trial conference approaching, your guidance is urgently needed. Because you addressed this issue once before, we believe nothing more is required than a brief order adhering to your decision of August 13 for the reasons stated therein.

Sincerely,

/s/ Laura Flahive Wu

Laura Flahive Wu

Laura Flahive Wu

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From: Andrea Bierstein <abierstein@simmonsfirm.com>

Sent: Wednesday, October 09, 2019 2:17 PM

To: 2804 Discovery, MDL <mdl2804discovery@motleyrice.com>; MDL 2804 <MDL2804@motleyrice.com>; David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>; 'xALLDEFENDANTS-MDL2804-Service@arnoldporter.com' <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>

Subject: RE: EXTERNAL-RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

[EXTERNAL]

External E-mail

Dear Special Master Cohen: The scope of the request below is not entirely clear. Plaintiffs note, however, that the question of the experts' errata was addressed in my letter to you dated September 26, 2019, as well as in an email from David Ko on October 2, while the separate issue of future damages is addressed in our opposition to Defendants' motion *in limine* on this issue. (For your convenience, all of those documents are attached here). Because the

issue of future damages is now before the Court in connection with the motion *in limine*, we respectfully suggest that only the question of the experts' errata is currently before you.

Andrea Bierstein

Simmons Hanly Conroy

t: 212.784.6403 direct | t: 212.784.6400 main | f: 212.213.5949

112 Madison Ave., 7th floor | New York, NY 10016 | simmonsfirm.com

From: 2804 Discovery, MDL [<mailto:mdl2804discovery@motleyrice.com>]

Sent: Tuesday, October 8, 2019 10:16 AM

To: MDL 2804 <MDL2804@motleyrice.com>

Subject: FW: EXTERNAL-RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

From: Flahive Wu, Laura <lflahivewu@cov.com>

Sent: Tuesday, October 8, 2019 2:11:37 PM

To: David R. Cohen (<David@SpecialMaster.Law> <david@specialmaster.law>

Cc: 2804 Discovery, MDL <mdl2804discovery@motleyrice.com>; <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com> <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>

Subject: EXTERNAL-RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

Special Master Cohen,

Given the short time before trial, Defendants respectfully renew their request for a ruling on their motion to strike any and all new expert material that Plaintiffs may seek to present in this case, specifically including the "Future Damages" information recently served by Plaintiffs.

Regards,

Laura

Laura Flahive Wu

Covington & Burling LLP

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From: Flahive Wu, Laura <lflahivewu@cov.com>

Sent: Wednesday, October 02, 2019 9:04 PM

To: Flahive Wu, Laura <lflahivewu@cov.com>; David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>

Cc: mdl2804discovery@motleyrice.com; xALLDEFENDANTS-MDL2804-Service@arnoldporter.com

Subject: RE: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

Special Master Cohen,

Attached please find Defendants' further request for an order striking any and all new expert material that Plaintiffs may seek to present in this case, specifically including the "Future Damages" tables that Plaintiffs produced for the first time on September 30.

Regards,

Laura

Laura Flahive Wu

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From: Flahive Wu, Laura <lflahivewu@cov.com>

Sent: Friday, September 27, 2019 9:23 AM

To: David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>

Cc: mdl2804discovery@motleyrice.com; xALLDEFENDANTS-MDL2804-Service@arnoldporter.com

Subject: MDL 2804: Request for relief -- plaintiffs' noncompliance with pretrial deadlines

External E-mail

Special Master Cohen,

Attached please find Defendants' request for an order (i) limiting the evidence that Plaintiffs may introduce at trial and (ii) striking any and all new expert material that Plaintiffs may seek to rely on or otherwise present in this case.

Regards,

Laura

Laura Flahive Wu

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